

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

RON FOSTER, MARKETING & PLANNING )  
SPECIALISTS LIMITED PARTNERSHIP, and )  
FOSTER FARMS, LLC, )  
 )  
Plaintiffs and Counterclaim Defendants, )  
 )  
v. )  
 )  
UNITED STATES ENVIRONMENTAL )  
PROTECTION AGENCY and ANDREW )  
WHEELER, in his official capacity as )  
Administrator, )  
 )  
Defendants and Counterclaim Plaintiffs. )

No. 2:14-cv-16744

### NOTICE OF SUPPLEMENTAL AUTHORITY

The United States respectfully submits this Notice of Supplemental Authority with respect to a recent decision from the United States Court of Appeals for the Ninth Circuit in *United States v. Lucero*, 989 F.3d 1088 (9th Cir. 2021). This decision is relevant to the United States' Cross Motion for Injunctive Relief, ECF No. 289, and Defendants' response thereto, ECF No. 290, currently pending before the Court.

In response to the United States’ Cross Motion for Injunctive Relief, Defendants assert that the compensatory mitigation that the United States seeks is unjust because two of the four streams buried by Defendants purportedly do not qualify as “waters of the United States” under the recently promulgated “Navigable Waters Protection Rule: Definition of ‘Waters of the United States,’” 85 Fed. Reg. 22,339 (April 29, 2020) (“2020 WOTUS Rule”). *See* ECF No. 290 at 3-5. As the United States explained in its brief, the 2020 WOTUS Rule does not apply to the discharges at issue in this matter, which occurred well before the June 22, 2020 effective date of the 2020 WOTUS Rule. ECF No. 293 at 7. Indeed, this Court previously concluded that the

definition of “waters of the United States” in effect at the time of Defendants’ unlawful activity governs the case. *See* Mem. Op. & Order, ECF No. 237, at 22. Consistent with that conclusion, the court in *Lucero* held that the 2020 WOTUS Rule does not apply retroactively. *Lucero*, 989 F.3d at 1104-05. This decision further supports the United States’ argument that the 2020 WOTUS Rule is irrelevant to the United States’ pending motion.

Respectfully submitted,

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Dated: May 24, 2021

**CERTIFICATE OF SERVICE**

I hereby certify that the EPA's Notice of Supplemental Authority was served on the following counsel for Counterclaim Defendants through the CM/ECF system.

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